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March 9, 2022

Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

via E-Mail

**Re: In the Matter of Accelerating Wireline Broadband Deployment by
Removing Barriers to Infrastructure Investment, WC Docket No. 17-84**

Dear Ms. Dortch:

On March 8, 2022, Brian Hurley of ACA Connects – America’s Communications Association (“ACA Connects”), and Thomas Cohen and the undersigned, of Kelley Drye & Warren LLP, counsel for ACA Connects, met with Ramesh Nagarajan, Acting Legal Advisor for Wireline matters in the Office of Chairwoman Rosenworcel. We also met on the same day with Adam Copeland, Michael Ray, and Elizabeth Drogula of the Wireline Competition Bureau (“Bureau”). The purpose of the meetings was to express ACA Connects’s support for the Commission’s adoption of the draft Notice of Proposed Rulemaking (“Draft NPRM”) in the above-referenced matter at its March 16, 2022, Open Meeting and to propose a small number of changes.¹

The *Draft NPRM*, if adopted, would seek comment and focus Commission attention on a number of important matters left unresolved by the Bureau’s January 2021 *Pole Replacement Declaratory Ruling*.² The *Pole Replacement Declaratory Ruling* provided a significant and welcome clarification that it is unreasonable and inconsistent with Section 224 of the Communications Act of 1934, as amended (the “Act”), the Commission’s Rules, and past Commission precedent for utilities subject to Section 224 to impose the entire cost of a pole replacement on a requesting attacher when the attacher is not the sole cause of the pole replacement.

While the *Pole Replacement Declaratory Ruling* confirmed this important principle, the subsequent experience of attachers, including ACA Connects Members, confirms that additional guidance is needed on how to allocate the costs of a pole replacement when the new attacher is not the sole cause. ACA Connects has long observed that unjust and unreasonable pole

¹ FCC-CIRC2203-02

² See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Declaratory Ruling, 36 FCC Rcd 776, 777, at ¶ 3 (WCB 2021) (“Pole Replacement Declaratory Ruling”).

replacement costs inhibit broadband deployment, especially in rural areas where many aging poles are in need of replacement. ACA Connects, thus, supports the *Draft NPRM* for addressing the primary issues that our Members continue to face when an attachment request leads to a pole replacement, because of insufficient capacity and the inability to create new space on an existing pole using traditional make-ready. In particular, ACA Connects supports the *Draft NPRM's* request for comment on a definition of red-tagged poles, whether the “but for” trigger some utilities use to ascertain when a requesting attacher is the sole cause of a pole replacement is lawful (it is not), the extent to which utilities and new attachers benefit from replacement of poles to accommodate new attachments when there is insufficient capacity, the extent to which later attachers (following a pole replacement) should reimburse the attacher whose request precipitated the replacement, and the relationship between charges assessed for a pole replacement and annual pole attachment charges.

ACA Connects also welcomes the opportunity to comment on whether utilities should be required to make information available to attachers and prospective attachers concerning the condition of poles and replacement plans. When such information is made available, the prospects for avoiding disputes is increased, which means that providers tend to be able to attach more quickly and bring competitive services to consumers, businesses, institutions, and governments.

ACA Connects advocated during the meeting for two changes to the *Draft NPRM*. First, ACA Connects urges the Commission to explore in the NPRM the scope of pole owners’ obligations to act in a nondiscriminatory manner with respect to pole replacement practices. As background, ACA Connects appreciates the balance the Commission seeks to maintain between the respective economic incentives of utilities and attachers as it considers updating its rules regarding pole replacements. Commission actions should not create disincentives for utilities to make pole replacements when there is insufficient capacity on a pole because the alternatives for an attacher, if any, to a pole attachment on a new, larger pole can often be more cost prohibitive than paying an appropriate share of reasonable and necessary pole replacement costs.

The *Draft NPRM* appears to state that pole owners need never replace a pole when that is the only way to meet an attachment request, i.e., they cannot be compelled to replace a pole.³ However, Section 1.1403 of the Commission’s Rules, implementing Section 244(f)(2) of the Act, provides that “a utility may deny a cable television system or any telecommunications carrier, and a utility that is a local exchange carrier may deny an incumbent local exchange carrier, access to its poles, ducts, conduits, or rights-of-way, on a nondiscriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.”⁴ Thus, for example, when a utility has replaced poles for some cable operators or

³ See *Draft NPRM* ¶ 34.

⁴ Accord 47 U.S.C. ¶224(f)(2) (“a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes”)

telecommunications providers when there is insufficient capacity, does the nondiscrimination obligation of Section 1.1403 and Section 224(f)(2) preclude that utility from denying a subsequent, similar attacher's request for replacement when there is insufficient capacity on a given pole? ACA Connects proposes the Commission add language to the *Draft NPRM* to develop a record on the existence of, and potential for, discrimination in the context of pole replacement practices and to make changes in its Rules in response to that record to protect against such discrimination. In the Attachment hereto, ACA Connects includes proposed language that it recommends the Commission add to ¶ 34 of the *Draft NPRM* to solicit comments appropriate to this matter.

Second, the *Draft NPRM*, in one place in the document, asks whether the Commission can provide "additional clarity . . . on the scope of refunds available under the Commission's existing rules governing pole attachment complaints."⁵ The *Draft NPRM* cites the Edison Electric Institute ("EEI") petition for declaratory ruling filed almost a year ago that asked the Commission to change the Commission's policy that the "applicable statute of limitations" under Rule 1.1407(a)(3) in a pole attachment dispute is the breach of contract statute of limitations of the state where the poles are located.⁶ The *Draft NPRM* does not specifically seek comment on the *EEI Petition* (which has already been put on Public Notice and been the subject of comments in the latter half of last year). ACA Connects explained in the meetings that the Commission, through the Enforcement Bureau, has clearly stated in several recent complaint cases that the Commission will apply the state breach of contract statute of limitations as the "appropriate statute of limitations."⁷ For this reason and in light of the full record developed in response to the *EEI Petition*, ACA respectfully requests that the last sentences of paragraphs 8 and 36 in the *Draft NPRM* be removed, along with the associated footnote references to the *EEI Petition*.

⁵ *Draft NPRM*, ¶ 36. The *Draft NPRM* also would "seek comment on the scope of utility liability for pole attachment rate refunds when rates are found to be unjust and unreasonable." *Id.* ¶ 8.

⁶ See Petition for Declaratory Ruling of The Edison Electric Institute, WC Docket No. 17-84, at 1 (filed April 20, 2021) ("EEI Petition"). EEI would have the Commission declare that the applicable statute of limitations is the same as the two-year limitations period set forth in 47 U.S.C. § 415(b) for carrier disputes. The EEI Petition also sought a ruling, again contrary to current Commission policy in complaint cases involving pole attachment disputes, that attacher-complainants cannot recover refunds from pole owners for periods that precede good faith notice of a dispute or the filing of a complaint, whichever is earlier. ACA Connect opposed the *EEI Petition*. See Opposition of ACA Connects to the Petition to the Edison Electric Institute Petition for Declaratory Ruling, WC Docket No. 17-84 (Aug. 23, 2021) ("EEI has presented no 'controversy' or 'uncertainty' for the Commission to resolve through declaratory ruling. Moreover, the *EEI Petition* fails to offer any compelling reason for the Commission to revisit either of the well-established policies that EEI seeks to overturn.").

⁷ See, e.g., *In the Matter of Verizon Maryland LLC v. The Potomac Edison Company*, Memorandum Opinion and Order, Proceeding No. 19-355, 35 FCC Rcd 13607, 13626 at ¶¶ 40-42 (Nov. 23, 2020) (applying the state statute of limitations in a pole attachment complaint case for refunds); *In the Matter of BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Memorandum Opinion and Order, Proceeding No. 19-187, 2021 FCC LEXIS 124, at *9, ¶ 9 (Jan. 14, 2021) (same).

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A copy of this letter is being filed with the Secretary's Office in this docket as required under Section 1.1206 of the Rules.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'E. Yorkgitis, Jr.', written over the typed name.

Edward A. Yorkgitis, Jr.
Attorney for ACA Connects

Attachment

cc: Ramesh Nagarajan, Office of Chairwoman Rosenworcel
Danielle Thumann, Office of Commissioner Carr
Austin Bonner, Office of Commissioner Starks
Marco Peraza, Office of Commissioner Simington
Adam Copeland, WCB
Michael Ray, WCB
Elizabeth Drogula, WCB

Attachment: ACA Connects’s proposed changes to the *Draft NPRM*

¶34 [Make the additions of the underlined text and remove the struck-through text] We seek comment on whether revising our cost sharing rules to recognize that utilities directly benefit from pole replacements needed to create capacity for new attachments and should pay a proportional share of those costs would have a positive or negative impact on the negotiation of pole attachment agreements and broadband deployment. ~~As the Commission has previously recognized,~~ The Commission previously has ruled that section 224 of the Act does not authorize us to mandate that utilities replace poles to create capacity for new attachments.¹⁰¹ We ask that commenters supporting or recommending specific cost allocation methodologies address why their favored solution will expedite pole attachment approvals without increasing denials, benefit consumers by connecting more people to broadband, and otherwise be in the public interest. We also seek comment on whether and under what circumstances we should revisit our interpretation of section 224 regarding the question of whether pole owners’ have obligations, in some situations, to make pole replacements. For example, Section 224(f)(2) permits denials of access to poles for insufficient capacity only on a nondiscriminatory basis. We invite commenters to address whether the Commission could, and should, require a utility, in response to an attachment applicant’s request, to replace a pole to create capacity for new attachments where there is otherwise insufficient capacity if the utility has accommodated or offered to accommodate attachment requests from other similarly-situated attachers to make such replacements in similar circumstances.

¶ 8. [Remove the following last sentence from the paragraph and the associated footnote 23] “Additionally, we seek comment on the scope of utility liability for pole attachment rate refunds when rates are found to be unjust and unreasonable.”²³”

¶ 36. [Remove the following last sentence of the paragraph and associated footnote 107] “We also seek comment on whether there is additional clarity the Commission can provide on the scope of refunds available under the Commission’s existing rules governing pole attachment complaints.”¹⁰⁷”